

THRC Annual Employment Law Seminar



Gender Discrimination

Presented by

M. Kim Vance

Baker Donelson Bearman Caldwell & Berkowitz PC

kvance@bakerdonelson.com

**Title VII of the 1964 Civil Rights Act
prohibits discrimination in
employment based on sex.**

So, what does discrimination
based on “sex” mean?

The Courts have always agreed that
“sex” in Title VII means gender –
male/female.

The Pregnancy Discrimination Act of 1978

- As used in Title VII, the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions;
- Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

Price Waterhouse v. Hopkins,
490 U.S. 228, 239 (1989)

The Supreme Court held that Title VII bars “not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.”

“Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”

Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989)

But courts refused to go farther. Although many cases attempted to expand Title VII's prohibition against sex discrimination to "sexual orientation," "gender identity" and "transgender" discrimination, the courts routinely dismissed these claims based on the idea **that Congress did not intend in 1964** to mean anything other than male v. female when it passed Title VII.

But that argument went by the wayside in the Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75, 79-80 (1998).

The Court explained . . .

“[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

As we began to see courts expand the definition of sex discrimination, we also saw legislative efforts to prohibit employment discrimination based on sexual orientation and gender identity.

Non-Discrimination in Employment Act

- This bill would add LGBT categories to the federally protected classes for purposes of employment discrimination.
- The bill has been repeatedly introduced in Congress over the last couple of decades.
- And it is still there. The most recent version of bill was introduced into the 113th Congress in the House on April 25, 2013.

State Law Overview

- 16 States prohibit discrimination on the basis of sexual orientation AND gender identity
- 5 States prohibit discrimination on the basis of sexual orientation
- 6 States prohibit discrimination on the basis of sexual orientation and gender identity in PUBLIC employment
- 3 States prohibit discrimination on the basis of sexual orientation in PUBLIC employment.
- 21 States have no laws prohibiting discrimination on the basis of sexual orientation or gender identity.
- Tennessee is one of those.

Does this mean that in 21 States
there is no protection whatsoever
against employment discrimination
based on sexual orientation or
gender identity?

MACY V. DEPARTMENT OF JUSTICE

Appeal No. 0120120821
EEOC April 20, 2012

The Facts

- Mia Macy, a transgender woman presenting as a man, talked to the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives Agency by telephone and was told the position was hers pending a background check.
- A few months later Macy told the outside company filling the position that she was in the process of transitioning from male to female and asked the company to advise the Agency Director of the situation.

The Facts

- Nine days later Macy was told the position was no longer available due to budget cuts.
- In a later conversation with an Agency EEO counselor, Macy discovered someone else was hired for the job.

The Procedural History

- Macy filed a formal EEO complaint with the Agency claiming discrimination based on her sex, gender identity, and sex stereotyping.
- The Agency accepted her complaint based on sex and sex stereotyping but refused to process her claim for gender identity discrimination claiming the EEOC did not have jurisdiction to hear such a claim.

The Appeal

- Macy appealed to the EEOC arguing:
 - 1. The EEOC had jurisdiction over the entire claim; and
 - 2. The Agency was essentially dismissing her gender identity and transgender discrimination claims by separating her complaint into sex discrimination claims and gender identity stereotyping claims.

Issue: Whether claims of discrimination based on gender identity, change of sex or transgender status constitute sex discrimination in violation of Title VII?

The EEOC Looked To . . .

- *Price Waterhouse's* interpretation of sex discrimination to include sex stereotyping;
- *Oncale's* reasoning the judicial interpretation of statutory language is not dependent upon the intent of Congress at the time the law was passed; and
- A series of fairly recent federal court decisions recognizing employment discrimination protection for transgender individuals.

The EEOC Found Title VII Prohibits

- Discrimination based on sex whether motivated by hostility;
- By a desire to protect people of a certain gender;
- By assumptions that disadvantage men;
- By gender stereotypes; or
- By the desire to accommodate other people's prejudices or discomfort.

Of significance the EEOC noted:

- Sex stereotyping is a means of demonstrating disparate treatment based on sex but is not a cause of action in and of itself.
- Stereotypical remarks can be evidence that gender played a part in an adverse employment action;
- The central question is whether the employer actually relied on the employee's gender in making the challenged decision.
- A transgender person can establish sex discrimination based on gender in many different ways, one of which is evidence of sex stereotyping.

The EEOC Ultimately Held:

- Claims of discrimination based on transgender status:
 - Are sex discrimination claims under Title VII; and
 - May be processed as complaints before the EEOC.

Practical Impact

- Even if you work for a in a State with no actual State law prohibiting discrimination based on sexual orientation or gender identity, you are not without a means of redress.
- You can file a Charge with the EEOC and it will be processed just as any other Charge.
- In a brown bag lunch webinar hosted by the EEOC specifically addressing the Macy decision and its impact, the EEOC noted that there is no magic language an employee has to use to get their Charge processed – they don't have to specifically say “gender stereotyping” for example or “gender identity” discrimination.
- Same rules for federal sector and private sector employees alleging a violation of Title VII.



How does the *Macy* decision impact the scope of sex discrimination under the Tennessee Human Rights Act?

Tennessee Law

- “Sex” means and refers only to the designation of an individual or person as male or female on the individual’s birth certificate.”
- Equal Access to Intrastate Commerce Act of 2012.

Best Practices

- Train HR professionals especially those who are charged with investigating employee complaints about the scope of unlawful sex discrimination.
- Training managers and supervisors so they can help reduce legal risks for conduct or comments in the workplace that might give rise to gender identity discrimination claims.
- Prepare for operations issues related to gender identity.
- Review your Anti-Discrimination Policies
 - Do you operate in States where sexual orientation or gender identity discrimination is specifically prohibited?
 - Do you want to cover these issues as part of a diversity or cultural awareness policy?
 - Is just a prohibition against sex discrimination sufficient?

Judicial Opinions Roll Out Interesting Issues . . .

Young v. UPS, Inc.

Fourth Circuit 1/9/13

- UPS offers light duty work to those employees injured while on the job or suffering from an impairment cognizable under the ADA. Under UPS policy, a pregnant employee can continue working as long as she can perform the essential functions of her job, but is ineligible for light duty work for any limitations arising solely as result of her pregnancy.

The Facts . . .

- At some point in September 2006, Plaintiff left her supervisor a note from Dr. Thaddeus Mamlenski indicating that she should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter.
- HR informed Plaintiff that UPS policy would not permit her to continue working as long as she had the twenty-pound lifting restriction.

Plaintiff's Legal Theory

- Plaintiff's core contention is that the UPS policy limiting light duty work to some employees—those injured on-the-job, disabled within the meaning of the ADA, or who have lost their DOT certification—but not to pregnant workers violates the PDA's command to treat pregnant employees the same "as other persons not so affected but similar in their ability or inability to work."

The Fourth Circuit Court of Appeals found UPS' policy to be facially neutral and “pregnancy blind.”

***Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)**

- The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees"

Pregnant Workers Fairness Act (PWFA), H.R. 5647 and S. 3565

- The bill requires employers to make the same sorts of accommodations for pregnancy, childbirth, and related medical conditions that they do for disabilities.
- Unlikely to make much headway in Congress this year.

Koren v. Ohio Bell Telephone Company, No 1:11-CV-2674

(N.D. Ohio Aug. 10, 2012)

- Jason Koren worked for six years at Ohio Bell under the name of Jason Cabot. His coworkers and a fellow manager knew he was homosexual.
- He then voluntarily left Ohio Bell for another job.
- Two years after leaving Ohio Bell he got married and took the name of his husband.
- He was rehired by Ohio Bell a year later in a limited term sales position. He legally changed his name to his husband's name soon thereafter.

Koren v. Ohio Bell (cont'd)

- Shortly after changing his name, Koren alleged his superiors began to treat him unfairly after learning of his marriage.
- One supervisor allegedly called him “Cabot” refusing to use his new last name.
- Koren was later terminated for absenteeism.
- Koren filed suit alleging gender discrimination under Title VII of the 1964 Civil Rights Act.

Koren v. Ohio Bell (cont'd)

- Ohio Bell moved for summary judgment on the grounds that Koren was attempting to pursue a claim for sexual orientation discrimination which is not recognized by Title VII as a gender discrimination claim.
- The Court held that employers who discriminate against employees because they fail to conform with gender stereotypes are engaging in sex discrimination since the mistreatment would not occur except for the victim's sex.

Koren made out a claim for sex stereotyping by contending:

- He failed to conform with traditional gender stereotypes by taking his spouse's surname, a traditionally female practice; and
- His supervisors harbored ill-will toward him due to this failure to conform, and ultimately terminated him because of it.

Birkholz v. City of New York

No. 10-CV-4719 (E.D.N.Y. Feb. 22, 2012)

- United States District Court granted Employer's motion to dismiss Plaintiff's sexual orientation discrimination claim on the grounds that it is well settled in the 2d Circuit that Title VII does not prohibit sexual orientation discrimination or harassment.
- HOWEVER, the Court denied summary judgment to the Employer on the retaliation claim finding that complaints of discrimination based on sexual orientation are protected under Title VII.

What the Court said . . .

- Because some complaints are not legally sustainable does not license an employer to retaliate in ways that would undermine Title VII's goal of providing unfettered access to statutory protections.
- Court noted that federal courts are divided on the issue of whether opposing discrimination based on sexual orientation can constitute protected activity under Title VII's retaliation provisions.
- Ninth Circuit says it is protected activity but Sixth and Seventh Circuits disagree.

A Note About Tricky Pleading

- Plaintiff's Amended Complaint appears to allege a “gender stereotyping claim” which the Court recognized may state a claim under Title VII,
- Plaintiff argued that his employer was motivated by the stereotype “that a homosexual is more likely to be a pedophile.” The Court said this assertion is a stereotype about gay men, not a stereotype about men in general.
- The gender stereotyping claim was dismissed.

What Questions Do You Have

